

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Interconnection Between Local Exchange)
Carriers and Commercial Mobile Radio)
Service Providers)

CC Docket No. 95-185

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REPLY COMMENTS OF MFS COMMUNICATIONS COMPANY, INC.

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, hereby submits the following reply comments pursuant to the *Order and Supplemental Notice of Proposed Rulemaking* released in the above-captioned docket on February 16, 1996 (FCC 96-61).

The purpose of MFS' reply comments is to address an issue that has been raised by other parties concerning the interpretation of Sections 251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"), with respect to the authority of regulators to impose "bill-and-keep" reciprocal compensation arrangements between incumbent local exchange carriers ("LECs") and other telecommunications carriers. This legal issue is likely to arise in many proceedings before State commissions as they seek to implement the requirements of the 1996 Act for the introduction of local exchange competition, and MFS, as a leading competitive provider of local exchange services,

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has a significant interest in the correct interpretation of the reciprocal compensation provisions of the 1996 Act.¹

**The 1996 Act Plainly Authorizes Regulators
to Impose Bill-and-keep Arrangements**

Bell Atlantic and Pacific Telesis have argued that neither the Commission nor any state commission has authority to mandate a bill-and-keep reciprocal compensation arrangement under Sections 251 and 252.² This conclusion is remarkable, in light of the fact that the Act endorses bill-and-keep arrangements in so many words. In order to uphold the Bell Atlantic/Pacific Telesis position, the Commission would have to determine that the Act means precisely the opposite of what it says. In fact, the Act says explicitly that regulators may impose bill-and-keep as an acceptable (although not the only permissible) form of reciprocal compensation arrangement.

The reciprocal compensation provisions of the Act appear in two paragraphs of the amended Communications Act. First, Section 251(b)(5) establishes that all local exchange carriers have the “duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.” Second, Section 252(d)(2) sets forth the following standard for regulatory review of reciprocal compensation arrangements:

¹ MFS takes no position on other issues in this docket (including, but not limited to, the extent to which Sections 251 and 252 apply to commercial mobile radio services). These comments address only the legal issue of whether Sections 251 and 252 *authorize* the imposition of bill-and-keep arrangements, not the policy issue of what (if any) rules the Commission should adopt in this docket.

² Bell Atlantic Comments at 5-6 (March 4, 1996); Pacific Bell *et al.* Comments at 24; *see also ex parte* letter from Michael K. Kellogg to William F. Caton, at 4-5, filed in this docket on March 13, 1996 (“Kellogg Letter”).

(A) IN GENERAL- For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) RULES OF CONSTRUCTION- This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

Even though subparagraph (B)(i), quoted above, states explicitly that section 252(d)(2) "shall not be construed . . . to preclude . . . bill-and-keep arrangements," Bell Atlantic and Pacific Telesis urge that this language be construed to preclude bill-and-keep arrangements, at least when imposed by any regulatory authority. Their argument for taking the Commission through the looking-glass hinges entirely on the presence of the word "waive" in subparagraph (B)(i). Bell Atlantic contends that a regulator "cannot approve a 'bill & keep' interconnection arrangement *unless* the parties to the agreement 'waive mutual recovery . . .'" It contends that this waiver must be "voluntary," but cites no statutory language or other legal authority to support this inference. Bell Atlantic Comments at

6 (emphasis added); *see also* Kellogg Letter at 5. Similarly, Pacific Telesis asserts that the “new Act . . . allows Bill and Keep only by agreement of the parties to ‘waive their mutual recovery.’” Pacific Bell *et al.* Comments at 24.

The Bell Atlantic/Pacific Telesis argument contravenes one of the cardinal principles of statutory interpretation—“*noscitur a sociis*.” This principle requires simply that words used in a statute must be construed in the context of the statute as a whole, not in isolation; or, as the Supreme Court put it, “a word is known by the company it keeps.” *Gregory v. Ashcroft*, 501 U.S. 452, 465 (1991). In the 1996 Act, the word “waive” is used in a section devoted to interconnection “agreements”; and, like “waive,” the word “agreement” could, taken out of context, imply a voluntary act. In the context of the Act, however, it is abundantly clear that an “agreement” may be either voluntary or imposed through arbitration. It would be entirely consistent with this regulatory structure to conclude that a party may “waive mutual recovery” as part of an “agreement” to which it did not voluntarily agree, but which was imposed by arbitration.

This conclusion is buttressed by more detailed analysis of the provisions of Section 252. Subsection (a) provides that an incumbent local exchange carrier may “negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers *without regard to the standards set forth in subsections (b) and (c) of section 251*.” (Emphasis added.) Section 252(d)(2), in turn, specifically states that it applies only “[f]or the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5),” which is not applicable to voluntary agreements. Therefore, *voluntary* reciprocal compensation agreements among carriers are permissible regardless of whether they satisfy the pricing standard of Section 252(d)(2). It was not necessary for Congress to mention bill-and-keep arrangements in subsection (d)(2)(B)(i) in order to validate *voluntary*

agreements. The necessary conclusion is that the pricing standards of subsection (d)(2) are applicable only to arbitrated, not voluntary, agreements.³

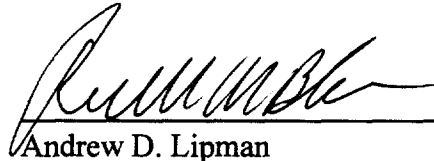
Further support for this interpretation is provided by other provisions of Section 252. Subsection (b)(4)(C) provides that a State commission, acting as an arbitrator, “shall resolve each issue . . . by *imposing appropriate conditions* as required to implement subsection (c) upon the parties to the agreement” (Emphasis added.) Subsection (c)(2), in turn, states that, when acting as an arbitrator, a State commission shall establish “rates for interconnection, services, or network elements according to subsection (d)[.]” These two provisions, read together, provide that an arbitrator may “impose conditions” upon a party to an agreement in order to effectuate the pricing standards of subsection (d); and subsection (d), as already noted, expressly authorizes bill-and-keep arrangements. Because Congress expressly stated that paragraph (d)(2) should not be construed to preclude bill-and-keep arrangements, it is indisputable that the arbitrator has authority to impose a condition that a party “waive mutual recovery” of transport and termination costs consistent with subparagraph (d)(2)(B)(i). Bell Atlantic’s and Pacific Telesis’ argument that a waiver can only be achieved through a voluntary agreement is squarely inconsistent with the plain language and the structure of the statute.

For the foregoing reasons, the Commission should reject Bell Atlantic’s and Pacific Telesis’ interpretation of Section 252, and should (in order to avoid confusion and disputes in proceedings

³ Similarly, subsection (e)(2)(B) states that a State commission, when reviewing an agreement (or portion thereof) adopted by arbitration, may reject the agreement if it does not meet the standards set forth in subsection (d). Significantly, this is *not* a ground for rejection of an agreement (or a portion thereof) adopted by negotiation under subsection (e)(2)(A). This dichotomy is further indication that Congress intended the subsection (d) standards to be applicable only to arbitrated, not to voluntary, agreements.

before the State commissions) affirmatively declare that Section 252 does permit imposition of bill-and-keep reciprocal compensation arrangements through the arbitration process.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Russell M. Blau", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March 1996, copies of Reply Comments of MFS Communications Company, Inc. were served by first class mail, postage prepaid, on the following:


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